IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 725 OF 1989

1. RAJU MURGES SUBRAMANYAM)
   Age 20 years.)
   Atpresent at Nasik Central)
   Jail.)
2. NICHOLAS @ TAMBI MHANU BABU)
   Age 25 years)
   At Yerawada Central Jail,Pune ..APPELLANTS

Versus

THE STATE OF MAHARASHTRA) .. RESPONDENT

Mr. R.R. Bhosale for appellants
Mr. D. S. Mhaispurkar, Addl. PP

CORAM:-SMT. RANJANA DESAI &
D. B. BHOSALE, JJ.
DATED:- 17/6/2005

ORAL JUDGMENT: (Per Smt. Ranjana Desai, J.)

. The appellants (accused 1 and 2 respectively for convenience) were tried in the court of Sessions at

Thane for offences punishable under Sections 302, 394 and 397 read with Section 34 of the Indian Penal Code ("I.P.C" for short). By his judgment and order dated 2/9/89, the learned sessions Judge convicted the accused for offence punishable under Section 395 of the I.P.C. and sentenced them to suffer imprisonment for life and to pay a fine of Rs.500/-, in default to undergo R.I. for further period of one month. The accused were acquitted of the offence under Section 302 of the I.P.C. Being aggrieved by the said judgment and order of conviction and sentence, the accused have approached this court.

2. The prosecution case may be shortly stated.

. Complainant PW 1 Gopichand Balumal Prabhudas Bhagya runs a grocery shop at Ulhasnagar. His father Balumal Prabhudas Bhagya used to serve in a railway workshop in Bombay. After returning from his duty Balumal used to come to the shop of his son and after spending sometime there, he used to leave for his home.

. On 25/2/88 Balumal came to the complainant’s shop at 8-15 p.m. He left for home at 10-15 p.m. While leaving he told his son to close the shop and follow him. Gopichand accordingly closed the shop

at 11 p.m. and started for home. On the way home at Shiv Gumpha bridge he found his father's cloth bag lying on the road. He also saw his father lying there in a pool of blood in an injured state. He found his father's wrist watch, gold ring and cash missing. He carried his father to the Central Hospital Ulhasnagar, where he was declared dead.

. At 12-15 a.m. on 26/2/88, he registered his F.I.R. at Vithalwadi Police Station. Messages were sent to neighbouring police stations by the Vithalwadi police station. At about 1-30 a.m. a party led by PI Sawant found accused 1 Raju walking in haste. He was searched in presence of panchas. A gold ring having letters "BP" engraved on it, a watch of HMT make and knife were found with him. His clothes had stains of blood. PI Sawant seized the articles and blood stained clothes of accused 1 and drew panchnama. On the next day he sent him to Vithalwadi Police Station along with report.

. On 27/2/88 PI Sawant laid a trap for accused 2 Nicholas. He was traced in Datta Kutir slum. On his search a cash of Rs.63-30 was found with him. He was searched under a panchnama. Accused 2 Nicholas stated that he had sold the watch to PW 4 Yusuf Sayyed. A memorandum was prepared. Accused 2 laid the police to the place of PW 4 Yusuf

Sayyed. Yusuf Sayyed produced the watch of Seiko company. It was seized by PI Sawant under a panchnama. Accused 2 also produced his blood stained clothes. Clothes of the deceased, clothes of both the accused along with the knife seized from accused 1 were sent to the chemical analyser. Postmortem was conducted on the deceased. After completion of the investigation the accused came to be charged as aforesaid.

3. In support of its case the prosecution examined as many as 9 witnesses. PW 1 Gopichand is the complainant. The prosecution examined panch witnesses to prove various panchnamas under which various articles were seized. The details of investigation were given by PW 7 PSI Ganpati Sawant attached to Ambernath police station and PW 8 is Ramkrishna Kankubje, who was at the relevant time attached to Vithalwadi Police Station as Senior Police Inspector. PW 9 Dr. Nagrajan has deposed about the postmortem conducted on the deceased. The defence of the accused was one of denial. According to them they were falsely implicated.

4. After perusing the evidence on record the learned sessions Judge came to a conclusion that deceased Balumal met with homicidal death on the night of 25/2/88, in the incident of robbery and

that the accused had robbed him and caused injuries to him in course of the robbery. The learned sessions judge, however was of the view that the accused did not cause injury with the intention that Balumal would die or with the knowledge that Balumal would die as a result of those injuries. As stated hereinabove the accused were sentenced to life for offence under section 395 of the I.P.C. and hence this appeal.

5. We have heard learned counsel appearing for the appellants-accused and the learned Addl. P.P. Mr. Mhaispurkar. With the assistance of the learned counsel, we have gone through the evidence and the record of the case.

6. Mr. Bhosale, learned counsel for the accused urged that the prosecution has failed to make out its case and the learned sessions judge erred in convicting the accused. The learned counsel pointed out that all the panch witnesses have turned hostile. Therefore, not a single panchnama is proved. Seizure of various articles is not proved and hence it was improper on the part of the learned Sessions Judge to rely on the interested testimony of the police officers and convict the accused.

7. The learned counsel further urged that the complainant's evidence also does not help the prosecution. The complainant has admitted that he did not know the amount of money which was carried by his father on his person. He has not produced any evidence to show that the ring in question was purchased by the deceased. Therefore, the claim that the ring belonged to the deceased itself is doubtful.

8. The learned counsel urged that there is no eye-witness account. The fact that murder was committed by the accused is not proved since the panchas have turned hostile and recovery of article is not proved. It must, therefore, follow that the prosecution has also not proved robbery. The learned counsel further pointed out that PW 4 Yusuf Sayyed has only stated that he purchased the watch from accused 2 for Rs.100/-. That in no way suggests that accused 2 was involved in robbery or killing of Balumal. Accused 2 could at the most be called a receiver of stolen property. PW 4 Yusuf is a receiver of stolen property and hence his evidence should not have been relied upon.

9. The learned counsel also contended that the panchnamas do not indicate that the articles were sealed. Therefore, the chemical analyser's report

can also not be relied upon. The learned counsel further contended that the investigating officer has admitted that statements of persons residing in the locality were recorded. However, the prosecution has failed to examine independent witnesses. Gopichand's evidence is in the nature of evidence of an interested witness. Inasmuch as there is no evidence of independent witness on record, it must be concluded that the prosecution has failed to prove its case. In the circumstances the learned counsel urged that the accused should be acquitted.

10. As against that Addl. P.P. Mr. Mhaispurkar contended that the prosecution has established its case to the hilt. He submitted that the Investigating Officer had no reason to falsely implicate the accused. Nothing has been brought on record to show that there was any reason for the Investigating Officer to falsely implicate the accused. Relying on the judgments of the Supreme Court in **Karamjit singh v. State (Delhi administration), (2003) 5 S C C 291** and **Lopchand Naruji Jat & Anr. v. State of Gujarat, (2004) 7 S C C 56**6, the learned APP urged that the testimony of police personnel should be treated in the same manner as testimony of any other witnesses unless it is shown that the police officers were bent upon

falsely implicating the accused. The learned APP urged that inthe facts of the present case reliance on the police officers' evidence is proper. The learned APP also relied on **Lachhman Ram etc. v. State of Orissa, AIR 1985 SC 486** to contend that recovery of stolen ring at the instance of the accused very soon after the occurrence goes long way to establish the charge of robbery against the accused. The learned APP urged that the conviction which rests on the cogent and credible evidence of PW 1 Gopichand, PW 4 Yusuf Sayyed and the police officers deserves to be confirmed by this court.

11. Before we deal with the rival contentions it is necessary to have a look at the evidence of PW 9 Dr. Nagrajan who had conducted the post mortem examination of the deceased. Post-mortem notes are dated Exh. 33. According to Dr. Nagrajan on external examination he found the following injuries.

> "Incised wound vertical 1 1/2" x 1/2" cavity deep involving 6th and 7th inter costal space. mide clavicular line on the right side."

Dr. Nagrajan opined that cause of death was "Haemorrhage and shock following Haemothorax due to lung injury due to stab injury".

12. PW 1 Gopichand has stated that his father deceased Balumal used to come to his shop every day at about 8-15 p.m. On 25/2/88 also he came to his shop at 8-15 p.m. He was in the shop upto 10-15 p.m. He left the shop at 10-15 p.m. He told his son Gopichand that he should close the shop and return home. At 11 p.m. Gopichand started for home. On his way he found his father lying in an injured condition on the road. His wrist watch, ring and cash were found missing. He carried his father to the hospital where his father was declared dead. Thereafter he lodged his complaint Exh.-9.

13. We are of the opinion that the evidence of this witness inspires confidence. It is pertinent to note that immediately after the incident at 12-55 a.m. on 26/2/88, he lodged his complaint. In the complaint he has referred to wrist watch of Seiko company, golden ring having BP mark on it and cash of Rs.300/- as being articles stolen from his father. The immediate lodging of the F.I.R. and mentioning of ring and watch in the F.I.R. make us

feel that the evidence of this witness can be safely relied upon. Even in his evidence in the court he has stated that the ring bore the letters BP which are the initials of his father. We find nothing unusual in the son describing the ring worn by his father. The evidence of this witness appears to us to be natural and worthy of credence.

14. We may then refer to the evidence of PW 7 Ganpati Sawant, who was at the relevant time attached to Ambernath Police Station. He stated that at about 1 a.m. on 26/2/88 he received a message that a robbery and murder had taken place in the limits of Vithalwadi Police Station. At about 1-30 a.m. he found accused 1 walking in haste. He stopped him and immediately took search in presence of panchas. One gold ring having letters BP engraved on it, one wrist watch of HMT make and a knife were found in his pocket. His clothes were stained with blood. The said articles and clothes were seized under panchnama Exh.12. He then sent the accused and the articles to Vithalwadi police station with his report, which is at Exh.-25. According to PI Sawant on the next day a trap was laid for accused 2 at about 6-15 a.m. Accused 2 was found in Datta Kutir slum. Upon his search a cash of Rs.63-30 was found in his pocket. The said amount was seized under panchnama Exh.-20.

Accused 2 was interrogated in the presence of panchas and he stated that he had sold the watch to one Yusuf Sayyed. A memorandum of what he had said was made which is at Exh.-21. Accused 2 led the police to the house of Yusuf Sayyed. Yusuf Sayyed produced the watch which was seized under panchnama Exh.-21. At the instance of accused 2 his clothes were recovered from his hut and the panchnama in that connection is at Exh.-22-A. His clothes are articles 13 & 14. PI Sawant then sent the said articles and accused 2 along with panchnama to Vithalwadi police station. He identified article 4 as a knife seized from accused 1 and articles 5 & 6 as the clothes seized from the person of accused 1.

15. In the cross-examination of this witness he has stated that articles siezed were sealed on the spot and that is even mentioned in the panchnama. We have carefully perused the panchnamas and we find that the panchnama do mention that the articles were sealed. Nothing has come in the corss-examination of this witness, for us to disbelieve him. There is nothing to indicate that he had any enmity with the accused so as to falsely implicate them.

16. PW 8 is Ramkisan Vaidyanath Kankubaje, who was at the relevant time attached to Vithalwadi police

station as Senior Police Inspector. He has stated that on 25/2/88 he received a message that an incident had taken place at Shiv Gumpha and the injured person had been carried to the hospital. He also learnt that PSI Kapile had recorded the complaint and sent it to the police station. He then sent wireless messages from the police station. On 26/2/88 at about 2-30 a.m. he received a message from PSI Sawant of Ambernath Police Station that accused 1 was traced and a ring and wrist watch were recovered from him. He was also informed that blood stained clothes of accused 1 were also seized. According to him on 1/3/88 he called complainant Gopichand to the police station. In the presence of panchas he opened sealed packet containing wrist watch and the ring and showed it to the complainant. The complainant identified the said articles. He proved the panchnama prepared by him which is at Exh.-29. Nothing has come in the cross-examination of this witness to persuade us to hold that this witness is an unreliable witness or is interested in falsely implicating the accused. There is nothing to indicate that there was enmity between him and the accused so as to concoct a false case against the accused. We find no difficulty in placing reliance on this witness.

17. It is true that he has stated that he had

recorded statements of some other persons and those persons have not been examined. In our opinion, however, that fact will not have any adverse impact on the prosecution story.

18. It is not necessary for the prosecution to examine all the witnesses whose statements are recorded. If the witnesses whose evidence is essential to the unfolding of the prosecution case are examined that suffices. In the facts of this case the evidence of the complainant inspires confidence. The complainant's evidence taken along with the evidence of the investigating officers and the other attendant circumstances, establish the prosecution case beyond reasonable doubt.

19. The prosecution has examined several panch witnesses. PW 2 Jayram is the panch witness to Exhibit-12 under which gold ring, HMT watch, knife and clothes of accused 1 were seized. PW 3 Gulab has also acted as panch to the same panchnama. Both these witnesses have turned hostile. PW 5 Nagesh is a panch to panchnama Exh.-20 under which the money was seized from accused 2 at the time of his arrest. He is also panch to Exh.-21 which is the memorandum and panchnama Exh.-21-A under which at the instance of accused 2 a Seiko watch was recovered from PW 4 Yusuf Sayyed. He is also panch

to Memorandum 22 and panchnama Exh.-22-A under which the clothes of accused 2 were seized. This witness his turned hostile. PW 6 Tulsiram is a panch to panchnama under which PW 1 Gopichand identified ring and watch shown to him. He has also turned hostile. It was vehemently argued by the learned counsel for the accused that since all these panchas have turned hostile, the prosecution story is completely discredited and must be rejected by us. He submitted that the seizure of articles like ring, watch, money and bloodstained clothes is not proved. The prosecution story, therefore, cannot be believed.

20. We are unable to accept this submission of the learned counsel. In this connection, we may refer to the judgments of the Supreme Court to which our attention was drawn by the learned APP. In **Lopchand's case (supra)** the Supreme Court was dealing with a case where the conviction was recorded solely on the evidence of the Investigating Officer. The accused were convicted for the offence punishable under Section 9-B(i)(b) of the Terrorist and Disruptive Activities (Prevention) Act, 1985 ("TADA"). It was argued that the said conviction cannot be sustained because the case rests on the evidence of police witness. The Supreme Court rejected this

submission and held that when the investigating officer was found to be trustful and/or inspite of incisive cross-examination, nothing material had been brought to discredit his evidence, the trial court was justified in recording his conviction.

21. We may also refer to **Karamjit Singh's** case (supra) where the Supreme Court was again dealing with a conviction under the TADA Act. In that case it was argued that all the witnesses of recovery examined by the prosecution are police personnel and in the absence of any public witness their testimony alone should not be held sufficient for sustaining the conviction of the accused. The Supreme Court rejected this contention. The Supreme Court observed that the contention raised was too broadly stated and cannot be accepted. It was further observed that the testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The Supreme Court added that the presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of

each case and no principle of general application can be laid down. We draw great support from this observation of the Supreme Court.

22. In this case the police officers' evidence appears to us to be cogent and credible. We find nothing on record to infer that there was enmity between the police officers and the accused; that they bore any grudge against the accused and hence they wanted to falsely implicate the accused. We find great consistency between the evidence of the two police officers. Their evidence appears to be above board and hence the recovery of wrist watch at the instance of accused 2 and seizures of articles can be safely relied upon. The seizure of ring having initial BP from accused 1 and the identification of the said ring by the complainant as being the ring of his father and the description of the ring given by the complainant in the F.I.R. lodged soon after the incident clearly establish the involvement of accused 1. Similarly the seizure of watch from PW 4 Yusuf Sayyed at the instance of accused 2 is also significant. PW 4 Yusuf Sayyed has stood firm and supported the prosecution. This circumstance also indicates involvement of accused 2 in the crime.

23. It is also pertinent to note that the clothes

seized from the hut of accused 2 had stains of blood having group "O". The blood found on the clothes of the deceased was also of group "O". On the clothes of accused 1 also the blood of O-group was found and on the knife seized from accused 1, also blood of "O" group was found. This circumstance clearly points to the guilt of accused 1. We have, therefore, no hesitation in concluding that accused are involved in the robbery and that injuries caused to deceased Balumal were caused by the accused during the course of incident of robbery. The learned sessions Judge has recorded that the prosecution has not proved that the injuries were caused with intention to kill Balumal or with the knowledge that he will die as a result of those injuries. Though intention cannot be inferred from the evidence on record the fact that the injuries were caused by the accused during the course of robbery is proved by the prosecution. We concur with this view. We find no reason to interfere with the judgment and order of conviction.

24. The learned counsel for the accused, however, contended that on the sentence to be awarded to the accused a lenient view may be taken. He submitted that at the time when the offence was committed accused 1 was 20 years of age, accused 2 was 25

years of age. The learned counsel drew our attention to the evidence of PW 9 Dr. Nagrajan and pointed out that the deceased had suffered only one injury. He submitted that only a single blow was inflicted on the deceased and hence in the circumstances of the case this court should reduce the sentence. Having regard to the fact that the accused were 21 and 25 years of age respectively when the offence was committed and the medical evidence which shows that only single blow was inflicted and that the accused had no intention to kill the deceased, we feel that the sentence of life imprisonment is too harsh and it deserves to be reduced. In our opinion, in the facts and circumstances of the case 10 years sentence to each of the accused will meet the ends of justice. Hence the order:

. The conviction of the accused under Section 394 of the I.P.C. is confirmed. However, the sentence of the accused is reduced to 10 years R.I. and a fine of Rs.500/-, in default to undergo R.I. for a period of one month.

. The appeal is disposed of in the aforestated terms.

. We appreciate the assistance rendered to us by Shri Bhosale, learned counsel for the accused.

(SMT. RANJANA DESAI,J.)

(D.B. BHOSALE,J.)

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Versus

THE STATE OF MAHARASHTRA .. RESPONDENT

Mr. R.R. Bhosale for appellants

Mr. D. S. Mhaispurkar, Addl. PP

CORAM:-SMT. RANJANA DESAI &

D. B. BHOSALE, JJ.

DATED:- 17/6/2005

OPERATIVE PART OF THE ORDER:

. For the reasons stated in the oral judgment this Court has confirmed the conviction of the accused under Section 394 of the I.P.C. However, the sentence of the accused is reduced to 10 years' R.I. and a fine of Rs.500/-. In default to undergo R.I. for one month.

The appeal is disposed of.

(SMT. RANJANA DESAI, J.)

(D. B. BHOSALE, J.)